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Real Estate

Austria

BLS Rechtsanwälte (Boller Langhammer Schubert GmbH)

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Law and Practice

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BLS Rechtsanwälte (Boller Langhammer Schubert Gmbh) is among the leading medium-sized law firms in Austria, with more than 40 years of experience and about 50 employees. In 2013, the independent certification body TÜV Austria Cert GmbH certified the business law firm's quality management system, attesting to its practice and client orientation. BLS was the first Austrian law firm to undergo this examination. It is the sole Austrian member of the international AVRIO Advocati European Law Firms Association, representing many clients internationally, and

providing advice in almost all areas of law, especially in connection with real estate matters. These include all kinds of real estate transactions, the provision of legal advice regarding the purchase or sale of realties of any size, legal support with a view to the optimisation of rental income and other questions arising in connection with building projects. The firm is assigned with the permanent legal representation of various real estate developers and building administration companies in respect of all matters concerning real estate law.

Author



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1. General

1.1 Main Sources of Law

The main source of Austrian real estate law is the General Civil Code (Allgemeines Bürgerliches Gesetzbuch). Further to that, there are various laws that regulate certain aspects of real estate, such as the Land Register Act (Grundbuchs-gesetz), the Act on the Right to Build (Baurechtsgesetz), the Act on Development Contracts (Bau-trägervertrags-gesetz) and state legislation on zoning and construction.

1.2 Main Market Trends and Deals

Austria remains an attractive expansion target for local and international real estate investors. Austria also attracts international developers and the level of demand remains high. Lately logistics properties have moved more into focus. Especially in Vienna, developers are bringing logistics and industrial space on to the market on a speculative basis. International retailers are still pushing into existing prime locations, although new retail space is hardly created in such areas.

With respect to the residential market, in 2018 student dormitories and micro-apartments were top priorities for investors. In order to be able to absorb the population growth in highly urbanised areas – especially Vienna – densification is becoming more and more visible. With rising land prices and a lack of space for development, living in residential towers is becoming increasingly attractive.

1.3 Proposals for Reform

Currently there is a proposal to introduce a new zoning category for publicly subsidised housing. The impact this would have on private real estate investors is that land zoned for publicly subsidised housing will no longer be available for privately funded development projects.

2. Sale and Purchase

2.1 Categories of Property Rights

Austrian law provides for different types of real rights, the most comprehensive one being ownership (*Eigentum*). Other forms of real rights are, for example, servitudes (*Dienstbarkeiten*), pledges (*Pfandrechte*) and the right to build on another one's land (*Baurecht*).

Ownership of a certain piece of real estate essentially includes ownership of the buildings and other structures connected to it. Exceptions are possible in respect of buildings erected on another one's land. Austrian law also provides for the possibility of co-ownership in real estate, which can be further divided into ordinary co-ownership, granting the right-holders a non-material share in the real estate, and so-called flat ownership, granting the right-holders a non-

material share in the real estate that is inextricably linked to a specific unit (eg, flat, parking lot or basement compartment).

2.2 Laws Applicable to Transfer of Title

The transfer of ownership and other real rights is regulated by the Austrian General Civil Code, the Austrian Land Register Act and various specific federal laws on the transfer of real estate. Apart from that, no other laws apply to the transfer of different types of real estate.

2.3 Effecting Lawful and Proper Transfer of Title

The transfer of ownership requires a valid title (eg, notarised purchase agreement) as well as an act of transfer. Since all real estate in Austria is registered in a public register, called the Austrian Land Register (Grundbuch), the transfer of ownership and most other real rights requires the registration of such rights in the Austrian Land Register. The registration itself constitutes the necessary act of transfer referred to above.

Since the legal fate of a building generally follows the legal fate of the land on which it is erected, ownership in the two can usually not be separated. However, in some exceptional cases, ownership in a building or structure on another one's land (*Superädifikat*; *Baurecht*) is possible. The ownership in some of these structures (ie, *Superädifikat*) is transferred by depositing the title deed (eg, notarised purchase agreement) with the court within whose jurisdiction the real estate is situated.

Due to the existing registration system, title insurance is not a common instrument in real estate transactions in Austria.

2.4 Real Estate Due Diligence

The level of scrutiny involved in real estate due diligence processes can vary, depending on the real estate involved and the purpose of the respective transaction. Typically, one would first access the Land Register and assess the rights and encumbrances registered in respect of the real estate. Certain environmental information, in particular whether the real estate is registered as a contaminated or possibly contaminated site, can also be accessed through the relevant public registers. In some transactions, potential purchasers commission experts to prepare a report on the real estate and the existence of possible contaminations, which usually includes on-site inspections and the taking of soil samples.

If buildings or other structures exist on the real estate, the building permits are assessed as to whether zoning prescripts or conditions applicable to the permit, if any, have been violated by the current owner. It is also of utmost importance to review all contracts relating to the real estate, in order to assess the full usage of it and to identify any restrictions and/or encumbrances that are not registered in the Land Register.

2.5 Typical Representations and Warranties

The General Civil Code provides certain statutory warranty rights for purchases that essentially intend to protect them against any deviation from the agreed features of the object of the sale. The statutory remedies for misrepresentations are warranty claims, which comprise the right to repair or replace the defective object (primary remedies), and reduction of the purchase price or, in some instances, withdrawal from the contract (secondary remedies). A purchaser may also claim any additional damages suffered if they were intentionally or negligently caused by the seller.

However, in practice, parties to real estate transactions typically deviate from the statutory warranty rules and agree on an exhaustive catalogue of assurances for which the seller will be liable. Depending on the strength of the respective parties' bargaining positions, these catalogues may vary greatly from one transaction to another.

The assurances that are to be found in almost any real estate transaction are that the real estate is free from registered encumbrances and any encumbrances not registered in the land register; that, at the time of handover, there are no outstanding payments with respect to all prescribed operating costs, contributions to the fund for repairs and maintenance, running public charges and any other costs related to the object; the non-existence of construction orders or any other orders concerning any unlawful constructions on the real estate; and that the seller has no positive knowledge of any kind of contamination.

2.6 Important Areas of Law for Investors

The different laws that should be considered by real estate investors largely depend on the type of investment they cover. Typically, laws concerning regional and local zoning, and the acquisition of building permits and plant licences as well as rental housing are among the most important ones.

2.7 Soil Pollution or Environmental Contamination

Several Austrian laws, such as the Water Rights Act (*Wasserrechtsgesetz*) and the Waste Management Act (*Abfallwirtschaftsgesetz*), prescribe the statutory liability of real estate owners for soil pollution or environmental contamination on or originating from their land. The owner's statutory liability to remove or reimburse the public authorities for procuring the removal of such contamination is typically subordinate to the liability of the person or entity who initially caused it.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

In order to ascertain the permitted uses of a parcel of real estate under applicable zoning or planning law, a prospective investor can access the various state databases on zoning that are mostly available online. However, such databases do not

necessarily reflect the latest state of zoning, which is why it is advisable to engage the local authorities directly and access the up-to-date zoning plans on-site. It is also possible to request a statement on the zoning of a particular parcel of real estate. In some federal states of Austria, developers can enter into urban development agreements (*städtebaulicher Vertrag*) with municipalities, which usually facilitates a project.

2.9 Condemnation, Expropriation or Compulsory Purchase

The right to property is a fundamental right protected by the Austrian Constitution. Accordingly, the state may only deprive a person or entity of their property in terms of law of general application and when the expropriation serves the public interest. Furthermore, adequate compensation must, in general, be paid to the expropriated owner.

Currently, there are several federal and state laws enabling expropriation. Typical examples for cases in which expropriation may occur are land acquisition for public railways or public housing. The usual process followed by the expropriating (governmental) body will be to engage the landowner and negotiate the sale of the real estate in consideration for fair compensation. If no agreement can be reached and the specific legislative requirements are met, the real estate can be expropriated for adequate compensation.

2.10 Taxes Applicable to a Transaction

The transfer of real estate is subject to a land transfer tax of 3.5% and a registration fee of 1.1% of the purchase price including value added tax (VAT), if applicable. These costs are typically borne in full by the purchaser. Land transfer tax, but not a registration fee, also applies if an entity acquires (or otherwise holds) more than 95% of the shares in a company that holds real estate, irrespective of when and how this threshold is exceeded. In some instances, exemptions may apply; for example, in different restructuring scenarios (mergers, demergers, etc).

Furthermore, profits generated from the sale of real estate are subject to real estate income tax (*Immobilienvertragssteuer*). The rate at which such profits are taxed may vary from 25% to 30% depending on whether an individual or a legal entity that is subject to corporate income tax is the tax subject.

2.11 Legal Restrictions on Foreign Investors

State legislation generally restricts the acquisition of real estate by non-EU nationals. The approval of the competent state authority is required in such cases for the transfer of real estate.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

The acquisition of real estate is financed with equity or debt capital. Typical financing options for acquisitions of real estate are senior and subordinated debt, operating and finance leasing, and sale and leaseback transactions.

3.2 Typical Security Created by Commercial Investors

When borrowing funds to acquire or develop real estate, the borrower will typically grant the creditor a pledge over the real estate in question (*Hypothek*). The pledge must be registered in the Land Register to be valid even towards third parties and is accessory to the secured claim, which means that it can only be transferred to a third party together with the secured claim and will cease to exist once the secured claim has been discharged in full.

A pledge over real estate extends to the buildings and other structures erected on it. However, due to the registration system in place, the real estate pledge is a non-possessory pledge, which means that the owner can continue to use the real estate.

Other common security instruments in real estate financing transactions are, for example, guarantees granted by affiliate companies, the pledge of certain receivables (eg, claims generated from leases and future insurance claims), a pledge over bank accounts or a pledge over the shares and interest (dividend payments) in the entity that owns the real estate. Although possible, the assignment of receivables as security (*Sicherungsabtretung*) is often avoided in bigger transactions, since stamp duty (*Rechtsgeschäftsgebühr*) of 0.8% may apply.

3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

There are neither restrictions on granting security over real estate to foreign lenders nor restrictions on repayment being made to such under a security document or loan agreement.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

A pledge over Austrian real estate requires a notarised pledge agreement and the registration of the pledge in the Land Register. In addition to the costs of legal representation, notary fees and a registration fee of 1.2% of the pledge's value will be payable. Other forms of security (eg, share pledge and receivables pledge) are usually not subject to such fees as they neither require a notarised agreement nor registration in a public register.

In order to enforce the pledge, judicial enforcement proceedings are usually required. Such proceedings are subject to court fees and possibly fees for an appraiser. The amount

of court fees that will be due depends on the secured claim's value. The creditor may claim reimbursement for such fees, which can be granted by court in a cost order.

3.5 Legal Requirements Before an Entity Can Give Valid Security

Under Austrian corporate law there is a rigorous system of capital maintenance rules (*Kapitalerhaltungsvorschriften*) that, inter alia, prohibit the return of equity from a company to its shareholders. A company may not make any payments to a shareholder other than the distribution of profit or in the course of a formal reduction of statutory capital. The provisions on the repayment of capital include any benefits granted by the company to its shareholders where no "adequate consideration" is received in return. Any agreement between a company and its shareholders, and/or any third party granting a benefit to the shareholders that would not, or not in the same way, have been granted to a third party is void.

The Austrian courts have broadly interpreted this mandatory principle and held that the prohibition of the return of equity generally also encompasses the granting of security by a company for a loan extended to its shareholders or any other group company other than such company's subsidiaries; for example, upstream or cross-stream guarantees or pledges of assets. However, what can be drawn from the Austrian Supreme Court's decisions is that the granting of security by a company for a loan of its shareholders is permissible if (i) it is at arm's length, hence adequate consideration is received in return and, after due investigation by the company, no doubts towards the reliability and solvency of the borrower (ie, the shareholder) are established that could give reason to believe that potential recourse claims might fail or (ii) the granting of security is to the operational benefit of the company.

In addition to these capital maintenance rules, directors of companies must, at any time, act with the diligence of a prudent businessman. In many cases, internal corporate governance rules exist, which outline the directors' responsibilities in more detail.

Furthermore, with regard to security granted by companies over their real estate assets, Austrian corporate law usually prescribes that such a transaction requires the shareholders' and/or supervisory board's approval.

3.6 Formalities When a Borrower is in Default

Most loan and security documents contain a detailed procedure for when an event of default occurs. Usually the creditor will be given written notice of the default and a certain amount of time to remedy it. Failure to comply will then typically trigger the enforcement clause in the respective security document, which entitles the creditor to realise the

pledge without any other legal court action, either by public auction or by private sale.

With regard to the enforcement of a pledge over real estate, however, such out-of-court realisation has not yet been tested in the higher courts. Therefore, enforcement typically involves judicial proceedings. First, the lender's claim must be established in so-called title proceedings. If successful, the lender can then enforce the pledge in separate execution proceedings. This usually entails a public auction in which the real estate will be auctioned off to the highest bidder. The auction price will then be used to repay the debts. An excess, if any, will be transferred to the debtor.

The rank of various pledges over the same real estate depends on the time of registration (principle of priority). Thus, if at the time of registration of a pledge other pledges are already registered in respect of the real estate, the older pledges will have priority over the younger ones.

3.7 Subordinating Existing Debt to Newly Created Debt

In general, existing secured debt can only be subordinated by agreement and by law. If an existing land pledge should be subordinated to a newly created land pledge, registration of such subordination in the land register is required to become effective. Before that you need the consent of the pledgee.

3.8 Lenders' Liability Under Environmental Laws

A lender who holds a pledge over real estate is not liable for soil pollution or any other environmental damage.

3.9 Effects of Borrower Becoming Insolvent

In principle, security rights (in particular pledges) are not affected by the debtor's insolvency and the beneficiaries of such rights have a right of segregation. However, there are a few exceptions to this principle, depending on the type of pledge as well as the time when the pledge is acquired.

For example, if the pledge has been created within two years before the opening of insolvency proceedings and is to disadvantage other existing creditors, the insolvency administrator may challenge it in court if he or she can prove that the beneficiary knew or must have known the debtor's intention to disadvantage other creditors. Another example would be that a pledge that is newly created within 60 days before the opening of the insolvency proceedings by judicial order (*richterliches Pfandrecht*) automatically expires.

Moreover, if the fulfilment of a pledge jeopardises the possible continuation of an insolvent company, fulfilment cannot be demanded before the expiry of six months from the opening of the insolvency proceedings.

3.10 Consequences of LIBOR Index Expiry

One of the key consequences of the expiry of the London Interbank Offered Rate (LIBOR) index by the end of 2021 is the necessary transition to new reference rates, unless banks continue to submit the underlying data and the Intercontinental Exchange (the LIBOR administrator) continues to publish LIBOR. When replacing LIBOR with other rates, issues may arise from the fact that the latter could be structurally different from LIBOR. In such cases, borrowers may be required to renegotiate the terms of their loan agreements, which may have an impact on their funding. Mechanisms to manage such risks include contract reviews, more conservative project planning and renegotiating a different reference rate before the expiry of LIBOR takes effect.

4. Planning and Zoning

4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

Strategic planning and zoning across regions and in localities in Austria is governed by federal legislation (*Bundesgesetze*), the legislation of the nine Austrian federal states (*Landesraumordnungsgesetze*) as well as regional and local development and zoning plans enacted through municipal by-laws (*Flächenwidmungs- und Bebauungspläne*). The federal competence to enact legislation with regard to zoning is limited to specific sectors, such as railways, federal roads and aviation.

4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

The design, appearance and method of construction of new buildings or refurbishment of existing buildings as well as the safety of such buildings are generally governed by the applicable state legislation on construction (*Bauordnungen*).

4.3 Regulatory Authorities

Municipalities are responsible for regulating the development and use of individual parcels of real estate. They also issue local development and zoning plans through municipal by-laws. The general zoning principles and guidelines for such plans are outlined in the relevant state legislation on zoning (*Raumordnungsgesetze*).

4.4 Obtaining Entitlements to Develop a New Project

In order to obtain entitlements to develop a new project or complete a major refurbishment, the developer (or owner) must submit an application to the competent municipality in which the intended use of the real estate as well as the planned development is outlined in detail. In the event that a particular project affects areas other than technical and safety standards or compliance with zoning (eg, the use as business premises, landmark protection or possible environ-

mental implications), the applicant may be required to file the necessary application with the relevant authorities.

Furthermore, the owners of adjacent properties are typically parties to proceedings concerning the issuance of building permits and, therefore, must be granted the right to be heard. The relevant state legislation usually awards specific rights to such neighbours, which may not be violated by the planned development.

If a development project complies with the relevant planning, zoning and building legislation, a building permit will be issued. In most cases, building permits are subject to a specific catalogue of conditions that must be fulfilled by the owner of the real estate and – if the condition is a permanent one – by every subsequent owner.

If the existing zoning plan needs to be changed to realise a particular development project, the developer can file an application for rezoning (*Umwidmung*) with the competent municipality. There is, however, no guarantee that the application is granted as re-zoning may not divert from applicable zoning principles and guidelines. In such cases it is advisable to co-operate with the local authorities as closely as possible to achieve the desired re-zoning.

4.5 Right of Appeal Against an Authority's Decision

In the event that the competent municipality dismisses an application for the issuance of a building permit or subjects it to unreasonable or unnecessary conditions, legal action can be taken against the municipality's decision.

Neighbours may institute proceedings to fight the issuance of a building permit, if the decision to grant it infringes upon their rights as provided by the relevant state legislation. Unlawful decisions that do not affect their specific rights cannot be appealed by a neighbour.

4.6 Agreements with Local or Governmental Authorities

In some federal states of Austria, including Vienna, it is permissible for municipalities to enter into private law agreements, also called urban development agreements (*städtebaulicher Vertrag*), with real estate owners. The aim of such urban development agreements is to support the realisation of planning objectives and, in particular, to involve the real estate owners in the infrastructure costs resulting from the re-zoning of their land.

4.7 Enforcement of Restrictions on Development and Designated Use

If a certain development project or the subsequent use does not adhere to the building permit, in particular the conditions it contains, the competent authorities can issue an order requiring the owner to reinstate the (previous) lawful

state or cease the unlawful use. Such orders may even require the owner to demolish an unlawfully erected building.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Under Austrian law, any legal entity that possesses the necessary legal capacity can acquire ownership in real estate. Various types of companies are available to investors in Austria, the most common ones being:

- a stock company (*Aktiengesellschaft*, AG);
- a limited liability company (*Gesellschaft mit beschränkter Haftung*, GmbH);
- an open commercial partnership (*offene Gesellschaft*, OG); and
- a limited commercial partnership (*Kommanditgesellschaft*, KG)

Furthermore, Austrian law also grants real estate funds within the meaning of the Austrian Act on Real Estate Investment Funds (*Immobilien-Investmentfondsgesetz*) partial legal capacity (*Sondervermögen*).

In regard to the acquisition and development of real estate, the entity most commonly used is the limited liability company. However, for the management of larger portfolios of real estate, in particular real estate investment funds, usually stock companies or limited partnerships are used.

5.2 Main Features of the Constitution of Each Type of Entity

The incorporation of a limited liability company requires a notarial deed and its registration with the Austrian Companies Register. A limited liability company as well as its assets are fully independent of its shareholders, who, save for certain rights and obligations, are typically not involved in the day-to-day operation of the company. Shareholders are not personally liable to the company's creditors if their respective capital contributions have been fully paid. Exceptions may apply in cases of collusion and qualified under-capitalisation of the company.

The company may have one or more managing directors who are responsible for the day-to-day operation of the company. The managing directors are bound by the shareholders' instructions, which may also take the form of a corporate governance code. Limited liability companies can have a voluntary supervisory and/or advisory board. However, in some instances – for example, when a company has on average more than 300 employees or its share capital exceeds EUR70,000 – the establishment of a supervisory board is mandatory. In practice it is rather unusual for limited liabil-

ity companies in the real estate sector to have a supervisory board.

5.3 Minimum Capital Requirement

The minimum capital for incorporating a limited liability company is EUR35,000, half of which must be paid in cash. Contribution in kind is also possible but can be subject to certain limitations. It is possible to make use of a so-called founding privilege, which reduces the minimum capital to EUR10,000 for the first ten years of incorporation. After expiry of the privileged ten years, the capital must be increased to EUR35,000. In practice, it is unusual to make use of the founding privilege when investing in real estate, since shareholders could expose themselves to liability for qualified under-capitalisation of the company.

5.4 Applicable Governance Requirements

Generally speaking, Austrian law does not prescribe any specific governance requirements for (private) companies in respect of real estate investments apart from the general principle that managing directors must always act with the diligence of a prudent businessman.

However, if real estate assets qualify as real estate funds pursuant to the Austrian Act on Real Estate Investment Funds, a statutory regulatory framework applies to the funds. The assets of such funds are owned by a specific real estate investment company, which holds them in trust for the investors and manages them. The investment company requires a licence under the Austrian Banking Act and its management is regulated by the Austrian Alternative Investment Fund Manager Act, which implemented Directive 2011/61/EU into Austrian law.

Real estate investment funds as well as alternative investment fund managers are subject to supervision by the Austrian Financial Markets Supervisory Authority (Finanzmarktaufsichtsbehörde).

5.5 Annual Entity Maintenance and Accounting Compliance

The annual entity maintenance and accounting compliance cost can vary depending on the type of company used and the real estate it holds. In regard to such costs, a general estimate is not possible. An assessment must take place on a case-by-case-basis.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

Austrian law distinguishes between two main categories of leases, namely *Miete*, which entitles the lessee to use the lease object (eg, for housing purposes or as commercial premises) and *Pacht*, which entitles the lessee to use the lease object

and generate profits from it. A typical example for *Pacht* would be the lease of an already established medical practice. Whether a lease agreement is considered *Miete* or *Pacht* depends on the contents of the agreement. In many respects, however, similar statutory rules apply to both.

6.2 Types of Commercial Leases

Apart from the differentiation between *Miete* and *Pacht*, Austrian law does not provide for further categories of commercial leases.

6.3 Regulation of Rents or Lease Terms

Lease agreements are mainly regulated by the General Civil Code, which contains certain rights and obligations of the parties in respect of the lease. These default rules apply unless the parties agree otherwise. The amount of rent chargeable is, in general, only subject to the limitations that it may not be against good morals (*contra bonos mores*) or exceeds an adequate market rate by more than 50% and the lessee had no knowledge of the amount that would be considered an adequate market rate (*laesio enormis*). Within these bounds, the amount of rent can be freely negotiated. The term of lease agreements is not regulated by law and may also be freely agreed on by the parties.

In respect of lease objects that fall into the (full) ambit of the Austrian Tenancy Act (this particularly concerns lease objects that are situated in buildings erected before 1945), mandatory rules apply regarding, among others, the lessor's maintenance responsibilities, the lessee's rights in respect of the lease object, the maximum rent chargeable, the (minimum) term and the grounds on which the lease agreement may be terminated.

It is also possible that lease objects do not or only partially fall into the ambit of the Austrian Tenancy Act. In such cases the lessor is subject to fewer mandatory obligations and lessees typically have fewer rights. Whether a lease object falls into the full or partial ambit of the Austrian Tenancy Act, or is not subject to it at all, must always be assessed on a case-by-case basis.

6.4 Typical Terms of a Lease

The term of a lease typically varies between three and ten years. However, it is possible to agree on longer terms.

In general, the lessor is obliged by law to maintain the lease object in the same condition as agreed by the parties and bear the costs for the repairs necessary in this respect. It is common practice to deviate from this default rule and agree on a transfer of the maintenance obligations from the lessor to the lessee. The lessor will then no longer be responsible for maintaining the lease object. However, with regard to the structure of the building as well as common spaces thereof, the transfer of the lessor's maintenance obligations can in some instances be unlawful.

The Austrian Consumer Protection Act as well as the Austrian Tenancy Act further restrict the possibility to shift maintenance and repair obligations from the lessor to the lessee. The Austrian Tenancy Act, for example, contains a catalogue of mandatory maintenance obligations and grants the lessee the right to enforce such obligations in court if the lessor fails to fulfil them.

If the term of the lease exceeds one year, the rent is payable every six months; in leases with shorter terms, the rent is payable at the end of the term. It is common market practice to deviate from these rules and agree on monthly payments in advance.

6.5 Rent Variation

Unless agreed otherwise by the parties (eg, turnover-linked rent), the rent payable to the lessor will usually remain the same throughout the term of the lease. The use of indexation clauses in lease agreements is common practice and allows the lessor to adjust the rent in accordance with the current Consumer Price Index (Verbraucherpreisindex).

With regard to lease objects that fall into the full ambit of the Austrian Tenancy Act (and serve housing purposes), the rent chargeable is strictly regulated by law. Rent that exceeds the maximum amount permissible (which is typically calculated with a view to factors such as area, building facilities, green spaces and other features) would be unlawful. However, indexation of the rent would be possible.

6.6 Determination of New Rent

As there is no statutory right to increase rent after the passing of a certain amount of time, no standard procedures as to how new rent will be determined exist. If a gradual increase of the rent or a turnover-linked rent is (validly) agreed upon by the parties, the lease agreement usually determines the way in which the rent and any increase thereof is to be determined. Turnover-linked lease agreements often contain a fixed minimum amount of rent to address the risk of weak economic performance.

Agreed indexation of the rent must be announced to the lessee in order to be valid and may be claimed for up to three years in retrospect. Usually indexation clauses contain a certain threshold (5% to 10%) and stipulate that an indexation may only take place once the respective threshold has been exceeded. Within the ambit of the Austrian Tenancy Act, an indexation must be announced in writing and may not take place retroactively.

6.7 Payment of VAT

The lease of an object for housing purposes is subject to 10% VAT in Austria. The lease of business premises is generally exempt from VAT. However, the lessor may opt to subject the rent to VAT, in which case a tax rate of 20% will apply.

6.8 Costs Payable by Tenant at Start of Lease

Cash deposits of three to five months' rent or a bank guarantee of the same amount are common securities agreed upon in lease agreements and are typically demanded before the beginning of the lease. Furthermore, an administration fee for drafting the lease agreement may also be payable to the lessor.

In regard to lease objects for commercial purposes, Stamp Duty of usually 1% of three times the annual rent for unlimited term leases or of the annual rent multiplied by the term of the duration in years (maximum of 18 years) for limited term leases applies and is usually paid by the lessee. However, vis-à-vis the tax authorities, both are jointly liable for the full amount.

6.9 Payment of Maintenance and Repair

The maintenance and repair of common areas is an obligation of the lessor unless otherwise agreed on by the parties. Lease agreements concerning entire buildings used for commercial purposes typically contain provisions that require the lessee to perform such maintenance and repair duties at its own cost. However, if the lease object falls into the ambit of the Austrian Tenancy Act or the lessor is an entrepreneur and the lessee a consumer, such deviations can be unlawful.

6.10 Payment of Utilities and Telecommunications

In respect of leases that are considered *Pacht*, the lessee has to bear the costs for utilities and telecommunications. Other agreements are, of course, possible. With regard to lease agreements that are considered *Miete*, it is the lessor's responsibility to shoulder such costs unless otherwise agreed on by the parties.

The operating costs for utilities and telecommunications may be billed in accordance with actual consumption or a flat-rate model. In practice, usually the flat-rate model is used, pursuant to which each lessee pays a proportional amount of the expenses for the entire building (based on the actual expenditure for the previous calendar year).

The lessee's proportional share of these costs depends on the size of the lease object in comparison to the entire building. If an increase of the operating expenses is required due to increased expenditure in the previous year, the lump sum may be increased by a maximum of 10% compared to the total of the previous year.

6.11 Insuring the Real Estate that is Subject to the Lease

It is common practice that owners insure buildings against risks such as fire, personal liability, water damage, glass breakage and damage from storm. This task is usually entrusted to the building administration, which, incidentally, can conclude a corresponding insurance policy even without instructions. Lessees can be charged with the costs

for such insurances. It is possible to insure further risks and pass on the costs to the lessee, unless the lease object falls into the ambit of the Austrian Tenancy Act.

6.12 Restrictions on Use of Real Estate

The purpose for which a lease object may be used is usually agreed on between the parties in the lease agreement and also subject to the respective building permit, the latter of which considers relevant state legislation on construction and zoning. Furthermore, in many instances the lessor and the lessee agree on certain house rules that regulate the use of the lease object as well as common spaces. The lessor may also prohibit the subletting of the lease object. However, within the ambit of the Austrian Tenancy Act, this may only be done for certain reasons (eg, when the entire lease object is sublet or the rent charged by the lessee is unreasonably high).

Neither the lessor nor the lessee may unilaterally change this purpose without approval of the respective other one. In the event that the lessee wishes to use the lease object for a different purpose than agreed on with the lessor and permissible under the respective building permit, the lessee will have to acquire a permit from the responsible local authority to change the purpose of use. The costs for such a change as well as construction measures that may be necessary or required by the authorities must generally be borne by the tenant.

6.13 Tenant's Ability to Alter and Improve Real Estate

Unless otherwise agreed, the lessee is generally not entitled to alter the lease object without the lessor's prior consent. Necessary or useful improvements may in certain instances be permissible without the lessor's consent and the lessee may claim reimbursement of its costs. Unless the lease object falls into the ambit of the Austrian Tenancy Act or the alterations are considered necessary (eg, the lease object poses a risk to the lessee's health) and the lessor is unable or unwilling to make such alterations, the parties may generally exclude the right to make such alterations and claim compensation.

6.14 Specific Regulations

In respect of certain lease objects, the Austrian Tenancy Act prescribes mandatory rules in respect of, among others, a minimum term, maximum rent chargeable and specific grounds for termination.

The Austrian Tenancy Act may apply fully or partially to a certain lease object if the lease agreement is considered *Miete*. It does not apply to *Pacht*. Whether an object falls (fully, partially or not at all) into its ambit will generally be determined by the amount of lease objects in the building, the age of the building, the length and purpose of the lease, or whether public funds were used to build or renovate the

building. It must therefore always be assessed on a case-by-case-basis.

6.15 Effect of Tenant's Insolvency

When a lessee becomes insolvent, usually an insolvency administrator will be appointed to manage the lessee's remaining assets. The lessor must submit any claims it has against the lessee to the insolvency administrator for assessment. The latter may then acknowledge or challenge these claims.

The insolvency administrator may also, without prejudice to the right to compensation for the damage caused, terminate the lease agreement in accordance with the statutory or the agreed notice period. Lessors do not have an extraordinary right to termination in the case of a lessee's insolvency. Moreover, any agreement granting such rights to a lessor would be unlawful.

Furthermore, in some instances the insolvency administrator may also apply to hold eviction proceedings for a certain period.

6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations

The form of security provided to a lessor to protect against a failure by the lessee to meet its obligations usually varies depending on whether the lease object is used for commercial or housing purposes. Typical securities for residential leases would be a cash deposit or a bank guarantee. With regard to commercial leases, other forms of securities are sometimes agreed on by the parties, such as sureties or guarantees from shareholders.

By law, the lessor also has a pledge over the movable property that was moved into the lease object by the lessee or one of its close family members living in the lease object together with the lessee (*Vermieterpfandrecht*).

6.17 Right to Occupy After Termination or Expiration of a Lease

Generally speaking, the lessee is not entitled to occupy the lease object after the expiry of the lease or a valid termination took effect. However, if the lessee continues to use the lease object after the termination date and the lessor does not object to such use within a reasonable amount of time (usually a 14-day limitation period), the lease agreement may extend by implication under the same conditions and usually for the same term that applied to the expired lease. *Pacht* typically only extends for one year in this manner.

The lease agreement may explicitly exclude the legal presumption on implicit extension. The Austrian courts, however, hold the view that such an exclusion does not automatically rebut this presumption.

Should the lessee fail to vacate the lease object after the termination date, the lessor must file an eviction suit. A judgment granting the eviction may then be enforced through the courts. The lessor may also claim appropriate compensation for the extended use of the lease object as well as other damages suffered.

6.18 Right to Terminate Lease

The events in which a lessor may terminate the lease agreement firstly depend on whether it is a fixed-term or an unlimited-term lease. Only in respect of the latter does the lessor have a statutory right to termination upon three months' prior written notice (in the case of *Pacht*, the notice period would be six months). Permissible termination dates may vary from case to case, depending on the type of lease.

This right to ordinary termination may, at least between entrepreneurs, be varied or even excluded by the parties in the lease agreement. In this case the lease agreement may be terminated for important reasons, which are, generally put, circumstances in which one party cannot be reasonably expected to continue the lease with the respective other one.

Furthermore, it is common practice that the parties to a lease agreement agree on further extraordinary termination rights in favour of the lessor. Within the (full and partial) ambit of the Austrian Tenancy Act, however, an exhaustive catalogue of grounds for termination applies.

6.19 Forced Eviction

Failure to pay rent on two consecutive due dates usually constitutes an important reason that allows for extraordinary termination. The lessor can terminate the lease agreement and should the lessee fail to vacate the lease object, after the termination date the lessor must file an eviction suit. As each court proceeding involves a unique set of facts and circumstances, it is not possible to make a general statement on the length of the eviction process. However, one year seems to be a reasonable duration for the proceedings in the first instance, if the lessee files any objections.

6.20 Termination by Third Party

In the event of insolvency, the administrator appointed by a court may terminate lease agreements in respect of the insolvent company.

7. Construction

7.1 Common Structures Used to Price Construction Projects

The most common price structures in construction agreements are a unit price or a fixed lump sum for the entire construction project. If a per unit price is agreed upon, the contractor may separately charge all services performed in order to complete the construction project. The final cost

of construction will therefore only be determined after its conclusion. The construction agreement typically contains a non-binding cost estimate.

7.2 Assigning Responsibility for the Design and Construction of a Project

The assignment of responsibility for the design and construction of a project may vary depending on the respective project. Usually it is divided between an architect who is responsible for planning the project and a contractor who is responsible for construction. Another option would be to contract a general contractor for all construction and planning services. The general contractor would then instruct an architect with the necessary planning as sub-contractor.

Architect's and contractor's fees are not strictly regulated. However, the performance and remuneration models published by the chamber of architects (*Leistungs- und Vergütungsmodelle 2014*) contain detailed guidelines as to the services usually rendered by architects in average-sized projects (divided into basic and optional services) and a range of compensation models.

7.3 Management of Construction Risk

Generally speaking, Austrian private law provides for a comprehensive liability system that generally applies to all contracts, including contracts concerning the planning and execution of a construction project. The liability of a contractor is not limited under statutory liability. However, parties often enter into construction agreements based on a standardised term published by the Austrian Standardisation Body (*ÖNORM B 2110*), which offers a deviation from the statutory liability system, providing for, among other things, a limitation of liability. To mitigate the risks involved in a construction project, constructors usually conclude a general liability insurance.

7.4 Management of Schedule-related Risk

Under statutory liability the contractor is liable for any delay in the performance of the construction work, if it is at fault (negligence or intent). Apart from that, the parties to a construction agreement often agree on contractual penalties (*Vertragsstrafe*) for delay of contractual milestones. Typically, a certain amount is payable by the contractor for each day's delay. However, contractual penalties may be subject to adequate reduction by court. Furthermore, the contractual penalties have to be deducted from any further damages claimed in respect of the delay of performance.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

It is common practice to agree on a performance bond (*Haftrücklass*) as security for the due performance of the contractor's obligations. Performance bonds are often partly retained until the end of the warranty period. The amount of such performance bonds may vary on a case-by-case basis.

Usually it lies between 5% and 10% of the contractor's net fees. In many instances it is possible for the contractor alternatively to present a bank guarantee.

7.6 Liens or Encumbrances in the Event of Non-payment

Contractors and architects do not have a statutory right to lien or otherwise encumber real estate in the event of non-payment. However, if their principal is also the owner of the relevant real estate and the outstanding payments were successfully claimed in court, a judiciary lien can be acquired in the enforcement proceedings. Furthermore, the contractors and architects have a right of retention in regard to movable items or securities of their principal, which came into their possession as a result of the work commissioned.

7.7 Requirements Before Use or Inhabitation

Building permits must be obtained before construction commences and the completion thereof must be notified to the competent local authorities. During the process of acquiring the building permit, the applicant must typically show that the necessary fire safety and other technical standards are met and produce the necessary certificates to the issuing authority. If the intended use of a certain building or structure is commercial in nature, a specific licence may be necessary in addition (*Betriebsanlagengenehmigung*).

8. Tax

8.1 VAT

The transfer of real estate is subject to land transfer tax, which is to be paid by the seller, but is usually covered by the buyer. Sales of real estate are generally exempted from VAT but it is possible for the seller to opt into it to retain the right to deduct input tax (*Vorsteuerabzug*). However, this will usually only be the case if a subsequent purchaser is equally entitled to deduct input tax.

If an entrepreneur erects a building or carries out major repairs and deducts input tax, the input tax must be adjusted if the building is sold within ten years (20 years for new buildings).

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8.2 Mitigation of Tax Liability

Land transfer tax at a rate of 3.5% applies to almost any act of transfer of real estate. In asset deals, it is therefore usually not possible to avoid this tax. In share deals, however, land transfer tax only applies if 95% of the shares of the company are held by one owner. For this, it is common practice in large transactions to transfer only 94.9% of the shares in the company and the remaining 5.1% will be held by a third party.

8.3 Municipal Taxes

Ownership of real estate and certain other limited real rights are subject to property tax. It is levied on the basis of federal legislation (*Grundsteuergesetz 1955*) by the municipalities. The tax authorities determine a basic value (*Einheitswert*) and use it as a basis for calculating this tax. The basic value is usually far below the market value. The tax rate varies between 0.5% and 2%, depending on the type of real estate and its basic value. There are certain exemptions from property tax; however, they are generally limited to non-profit or religious organisations and governmental institutions.

8.4 Income Tax Withholding for Foreign Investors

Foreign investors whose seat or domicile is located outside Austria have restricted tax liability in respect of income tax in Austria, which means that only their income generated in Austria will be taxable. Individuals are subject to income tax at progressive rates, while legal entities are generally subject to corporate income tax at a rate of 25%.

Profits generated from the sale of real estate are generally subject to real estate income tax of 30%. However, companies that are subject to corporate income tax at a rate of 25% are exempt from real estate income tax. The sale of owner homes, which served as the seller's main residence for a minimum of either two consecutive or five out of ten consecutive years, is exempt from real estate income tax.

The basis for assessing real estate income tax is usually the difference between the purchase price and the selling price of real estate; ie, the profit made on the sale. Investments made in terms of the real estate (erecting a building) may be deducted. Real estate income tax is a self-assessment tax, which means that the seller must calculate the amount himself, notify the tax authorities and transfer the tax.

8.5 Tax Benefits

In so far as a building constitutes a necessary business asset, it must be included in the list of assets and valued at the purchase price or the cost of construction. The loss of value resulting from the building's depreciation may be considered as operating expenses. In order to calculate the depreciation rates, the value allocated to the building must be distributed evenly over its remaining lifespan. Usually depreciation rates range between 2% and 3%.